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No. _____

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IN THE

Supreme Court of the United States

October Term 1992

JAMES EDWARD SMITH, and
RICHARD LEANDER SMITH,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a trial for substantive drug possession and distribution offenses, the admission of evidence of conduct which formed the basis for a conspiracy charge to which petitioner had previously pled guilty, in a separate prosecution, violated his rights under the Double Jeopardy Clause of the Fifth Amendment?

2. Whether, in the absence of a charge of conspiracy, admission of proof of other crimes which occurred over a twenty year period, under Federal Rule of Evidence 404(b), when those crimes were admitted to prove facts not in issue, and for the specific purpose of trying the defendant for his entire history of drug dealing, violated Federal Rule of Evidence 404(b), and denied petitioner his right to due process of law

under the Fifth Amendment?

3. Whether a criminal defendant must take some affirmative action to make the voluntariness of his confession an issue at trial, in order to be entitled to a jury instruction on the issue, pursuant to 18 U.S.C. §3501?

LIST OF PARTIES

The parties to the proceedings below were petitioners, James E. Smith, and Richard L. Smith, and the respondent, the United States of America.

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APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in pertinent part, "No person shall be ... subject for the same offense to be twice put in jeopardy of life or limb ... or be deprived of life, liberty, or property, without due process of law...."

STATUTORY PROVISIONS

Federal Rule of Evidence 404(b) provides in pertinent part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...."

Federal Rule of Evidence 403 provides

in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, ... or needless presentation of cumulative evidence."

18 U.S.C. §3501 provides, in pertinent part, "If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between

arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NO. _____

JAMES EDWARD SMITH, AND
RICHARD LEANDER SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, James E. Smith and Richard L. Smith, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled

proceedings on June 10, 1992.

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit is reprinted in the appendix. (App. 1-10).

The judgement of the United States District Court for the Eastern District of Virginia is reprinted in the appendix. (App. 11-16).

JURISDICTION

The judgement of the United States Court of Appeals for the Fourth Circuit was entered on June 10, 1992. By order of this Court dated August 25, 1992, petitioners' time within which to file their Petition for Writ of Certiorari was extended to October 8, 1992. (App. 17).

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. The Proceedings Below

In August, 1990, petitioners James E. Smith (hereinafter "James"), and Richard L. Smith (hereinafter "Richard") and their co-defendant, Olivia Bratton, were indicted in the Eastern District of Virginia for a number of primarily drug trafficking offenses. (App. 18-48). Specifically, James was indicted on two counts of using a telephone to facilitate drug trafficking, 21 U.S.C. §843(b), one count of possession of a firearm by a convicted felon, 18 U.S.C. §922(g), one count of distribution of heroin, 21 U.S.C. §841(a)(1), one count of interstate travel to promote drug trafficking, 18 U.S.C. §1952(a), one count of possession with intent to distribute heroin, 21 U.S.C. §841(a)(1), and one count of participation in a drug trafficking conspiracy, 21

U.S.C. §846. Richard was indicted on telephone, interstate travel and possession with intent to distribute heroin counts, as well as two counts of distribution of heroin, 21 U.S.C. §841(a)(1), one count of distribution of cocaine, 21 U.S.C. §841(a)(1), and one drug trafficking conspiracy count, 21 U.S.C. §846. The indictment was based on allegations that, while incarcerated on charges pending in the District of Columbia, James conspired with Bratton and Richard, among others, to transport and distribute heroin and cocaine which petitioners had stored in apartments in the Washington metropolitan area. The United States District Court for the Eastern District of Virginia had jurisdiction over the matter pursuant to 18 U.S.C. §3231.

The district court, by order dated February 20, 1991, dismissed the conspiracy charge against petitioner James Smith on the grounds that his plea to the conspiracy charges in the District of Columbia was a double jeopardy bar to prosecution on that charge, it being the same conspiracy. (App. 51-52).

Petitioners and Bratton were tried together. The jury acquitted James on one count of using a telephone to facilitate a drug transaction, and convicted him on all other counts. Richard was convicted on six of seven counts, including the conspiracy count, and Bratton was acquitted of all charges. The district court denied all post-trial motions and sentenced petitioner under the federal sentencing guidelines.

Petitioners filed their Notice of Appeal to the United States Court of

Appeals for the Fourth Circuit on May 23, 1991 (App. 53-54). On June 10, 1992, the Court of Appeals affirmed the convictions. By order dated August 25, 1992, this Court extended the time for filing this petition until October 8, 1992.

B. The Facts in This Case

On March 16, 1988, petitioner pled guilty in the District of Columbia to a charge of conspiracy to distribute narcotics, and was sentenced to a term of 35 years in prison. At the trial on the charges petitioners now appeal, the Government introduced, over their objections, massive evidence regarding the conduct that formed the basis of James' prior conviction, as well as other prior acts by him. That evidence included particulars of James' twenty year history of drug dealing, and details as to costs and methods of distribution in the early

seventies and even late sixties.

Specifically, the government introduced testimony of DeVoyce Gay Caviness which related solely to the D.C. conspiracy, and was unrelated to the crimes with which petitioner was charged in the Eastern District. Ms. Caviness testified that, in 1984, she started dealing heroin by going by to see James, that he became her supplier, that she stopped dealing when she became pregnant, that she went back to James after her pregnancy to begin dealing again, and that she continued to deal until she was arrested in 1987. (App. 55-69). She also testified that she did not know who else was in petitioner's organization, and that she did not know where he distributed heroin. (App. 55-69). She had no knowledge of anything related to the offenses charged.

The government also introduced the testimony of Veronica Baker, which related only to the sting conducted against James which resulted in his arrest and conviction in the District of Columbia, and was irrelevant to the charges in the Eastern District of Virginia. (App. 70-80). Baker's testimony was particularly prejudicial, because it was the only testimony from a non-trafficker directly linking James to the distribution of drugs. Baker provided eyewitness police testimony placing petitioner in actual possession of a substantial amount of narcotics, even though those narcotics were not related to the offenses charged. (App. 70-80).

The government also introduced the testimony of Barbara Lyles, a policewoman from the District of Columbia, which again related solely to the D.C. conspiracy

charge and not to the Eastern District charges. Lyles testified as to her attempts to engage James in drug transactions in 1985. (App. 81-93). Specifically, she testified as to a meeting she had with him in that year, in which James indicated his ability to secure various narcotics for her, and discussed certain details of drug dealing. (App. 81-93). She also produced a tape of that conversation, which was played for the jury. (App. 81-93). Again, the testimony was unrelated to the offenses charged.

Over defense objection, James R. Smith, Charles Smith and Excel Alexander testified at length as to the entire history of their drug transactions with James, spanning some twenty years. (App. 91-105, 106-119, 120-127). These witnesses were allowed to testify to the

following facts: how they came to deal drugs for and with James (App. 91-105, 106-119, 120-127); how they purchased drugs from him (App. 91-105, 106-119, 120-127); how they made deliveries for him (App. 91-105, 106-119, 120-127); that the witnesses had a "steady stream of customers" (App. 91-105, 106-119, 120-127); that James would not identify his sources because he did not want James R. Smith to obtain drugs directly from them (App. 91-105, 106-119, 120-127); that James "cut [the witness] off" years earlier (App. 91-105, 106-119, 120-127); and the cost of drugs in 1970. (App. 91-105, 106-119, 120-127).

The government introduced against Richard a statement obtained from him by the drug task force. Richard was induced to meet with the officers by a note that was left with his wife, stating that he

would "be able to save himself some serious problems by talking with [them]." (App. 129). At that meeting, Richard gave the statement. The district court denied Richard's motion to suppress the statement, and subsequently refused to instruct the jury on the issue of voluntariness.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's per curiam decision decides an important question of law which should be addressed and decided by this court. In U.S. v. Felix, ___ U.S. __, ___ S. Ct. ___, 118 L.Ed.2d 25 (1992), this Court applied its holding in Grady v. Corbin, 495 U.S. 508 (1990), and held that prosecution of a defendant for conspiracy, where certain of the overt acts of that conspiracy are based on substantive offenses for which the defendant has been previously prosecuted, does not violate

the Double Jeopardy clause.

In this case, however, the opposite fact pattern emerged. James was first convicted of the conspiracy, and evidence of that conspiracy was then used against him in a subsequent prosecution for substantive offenses arising from that same conspiracy. The Fourth Circuit, citing Grady, held that this prosecution did not violate the Double Jeopardy clause, without distinguishing petitioner's situation from that in Grady and other Fourth Circuit decisions applying Grady. Since both the logic and policy considerations behind Grady and its progeny are not applicable to this situation, this Court must decide this important issue of law.

In addition, the Fourth Circuit's decision that the evidence of James' twenty-year long participation in drug

distribution was admissible under Federal Rule of Evidence 404(b) conflicts with prior decisions of this Court and other circuit courts.

This Court has stated that the "threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988). In this case, the Fourth Circuit found that the evidence of James' participation in a past conspiracy was properly admitted to show intent, motive, and common scheme. However, none of these facts were in issue in his case, and thus the Court erred by admitting the evidence under Rule 404(b). Furthermore, the Fourth Circuit's decision is based on an application of Federal Rule of Evidence 404(b) which conflicts with

the views of the other Circuit Courts of Appeals as to when a 404(b) factor is at issue.

Finally, the district court clearly erred by refusing to submit the issue of voluntariness to the jury, as 18 U.S.C. §3501 contemplates. This Court should consider the question of whether, as the Fourth Circuit held, the defendant must take some undescribed affirmative action to place the question of voluntariness before the jury.

ARGUMENT

I. THE ADMISSION OF EVIDENCE OF CONDUCT COVERED BY PETITIONER'S PRIOR GUILTY PLEA TO A CONSPIRACY CHARGE IN A SUBSEQUENT PROSECUTION FOR SUBSTANTIVE OFFENSES, COMMITTED AS PART OF THAT CONSPIRACY BEFORE ENTRY OF HIS PLEA, VIOLATED HIS RIGHTS UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT

In these proceedings for substantive drug and firearm offenses, the

overwhelming majority of the government's evidence consisted of conduct that was part of the conspiracy to which James had already pled guilty in the District of Columbia. A thorough reading of the record in this case leads to the inevitable conclusion that the introduction of this evidence resulted in, as a practical matter, a retrial in the Eastern District of Virginia for the same conduct to which he pled guilty in the District of Columbia. Such a result conflicts with the nature and purposes behind the Double Jeopardy Clause.

A. The Logic And Policy Justifications For This Court's Decision In Felix Are Not Applicable To Cases In Which Evidence Of Conduct Underlying A Conspiracy Charge Is Introduced In A Subsequent Prosecution For Substantive Offenses

The Double Jeopardy Clause bars a subsequent prosecution for conduct which has already been prosecuted. The

Government's case consisted largely of evidence of James' drug trafficking prior to his guilty plea to conspiracy in the District of Columbia, all of which was part of, and in furtherance of, that conspiracy. The government introduced the testimony of DeVoyce Gay Caviness, who knew only of her dealings with James prior to his arrest in D.C. (App. 55-69), the testimony of Veronica Baker as to the transactions leading up to his arrest in D.C. (App. 70-80), and the testimony of Barbara Lyles as to his distribution of drugs in 1985, including a tape recording of a transaction from that year. (App. 81-93). In addition, the Government introduced substantial testimony from both James Reginald Smith, Charles Smith and Excel Alexander relative to their dealings with James over a twenty-year period. (App. 91-105, 106-119, 120-127).

In Grady, this Court held that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in the prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 510. After the ruling in Grady, the Courts of Appeals differed in determining what effect Grady would have on a subsequent prosecution for conspiracy when a defendant had previously been prosecuted for the substantive offenses which constituted the overt acts of that conspiracy. See United States v. Calderone, 917 F.2d 717 (2nd Cir. 1990); contra United States v. Rivera-Feliciano, 930 F.2d 951 (1st Cir. 1991).

In United States v. Felix, this Court resolved the split in the circuits, and

held that Grady did not prevent the prosecution of a defendant for conspiracy, where certain of the overt acts of that conspiracy were based on substantive offenses for which the defendant had previously been convicted. This Court's holding was consistent with the approach taken by the Fourth Circuit on that exact fact pattern, i.e. a conspiracy prosecution following a prosecution for the substantive offenses. See, United States v. Clark, 928 F.2d 639 (4th Cir. 1991).

In United States v. Arnoldt, 947 F.2d 1120 (4th Cir. 1991), the Fourth Circuit explained the reasoning behind its holding in Clark. While recognizing the "weighty concerns" of the Double Jeopardy Clause, the court stated that barring the conspiracy prosecution once the defendant had been prosecuted for the underlying

substantive offenses would "unduly infringe prosecutorial discretion and effectively `force the Government's hand'". 947 F.2d at 1127. Specifically, the court felt that, without such discretion, "the government would be forced either to proceed against a defendant for violations that might later serve as predicate acts and foreclose a RICO prosecution in the future or allow predicate acts to go unpunished in anticipation that at some future time the RICO elements would coalesce". Id.

Clearly, these concerns are not present in this case, for the exact opposite fact pattern exists. Here, the government had already prosecuted James for the conspiracy, and used evidence of this conspiracy to prove substantive drug and firearms offenses that were part of the conspiracy. In such a scenario, the

government is not forced to idly sit by and watch offenses being committed, nor is it forced to chose between prosecuting the conspiracy or the underlying offenses. Barring the use of evidence of the conspiracy in this case, and others like it, would simply require the government to prosecute the overt acts at the same time it prosecutes the conspiracy.

The result reached by the Fourth Circuit allowing subsequent prosecution would conflict with the basic principle behind the Double Jeopardy Clause, that the government "with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal, and compelling him to live in a continuing state of anxiety and insecurity." Green v. United States, 355 U.S. 184, 187

(1957). The instant prosecution has violated this principle. By introducing massive amounts of evidence covered by James' prior D.C. conspiracy conviction, the government was able to secure a conviction in the Eastern District trial by retrying defendant for the D.C. conspiracy.

In order to determine the applicability of Grady to the reverse scenario presented in Felix, this Court should grant the writ of certiorari.

II. PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WAS VIOLATED BY THE WHOLESALE INDISCRIMINATE ADMISSION OF PROOF OF OTHER CRIMES WHEN PETITIONER DID NOT CONTEST ANY VALID PURPOSE FOR RULE 404(B) EVIDENCE

As noted above, much of the evidence introduced by the Government consisted of "other crimes" evidence, which was irrelevant to the crimes with which the petitioner was charged. The Fourth

Circuit upheld the admission of this evidence pursuant to Rule 404(b) of the Federal Rules of Evidence, despite the fact that none of the enumerated factors in Rule 404(b) were in dispute. To the extent any of that evidence was relevant, its prejudicial effect clearly outweighed its probative value.

In Spencer v. Texas, 385 U.S. 554, 569 (1967), a majority of this Court accepted the proposition that evidentiary issues could implicate constitutional due process protections.[1] Grady implicitly recognized the same principal. Here, the rulings of the District Court and the Fourth Circuit both violated the clear

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[1] Spencer was a 4-1-2-2 decision. The fifth vote for affirmance of the convictions was provided by Justice Stewart, who implicitly recognized the constitutional due process protections at issue here. Thus, a majority of this Court accepted that proposition.

mandates of the Federal Rules of Evidence, and the right to due process of law that Rule 403 and 404(b) are intended to protect. Rule 404(b) of the Federal Rules of Evidence provides for the limited admission of "prior crimes" evidence. Such evidence is admissible to prove various enumerated issues other than character, if those issues are material and in dispute. Huddleston v. United States, 485 U.S. 681, 686 (1988)(emphasis added). The admission of prior crimes evidence is "`not looked on favorably and its use must be narrowly circumscribed and limited.'" United States v. Rivera, 837 F.2d 906, 911 (10th Cir. 1988), quoting United States v. Lewis, 787 F.2d 1318, 1321 (9th Cir. 1986). Even if the prior crimes evidence is probative of one of the factors identified in Rule 404(b), and that factor is a material, contested

element in the instant case, the court must determine whether its probative value is outweighed by its prejudicial effect. Huddleston, 485 U.S. at 687.

A. The Fourth Circuit's Decision To Uphold The Admission Of The Prior Crimes Evidence Despite The Lack Of Dispute As To Any Of The Factors Mentioned In Rule 404(b) Conflicts With A Prior Decision Of This Court And Is In Conflict With Decisions Of Other Circuits

The Fourth Circuit held that the evidence involving the prior conspiracy was properly introduced to show James' intent to possess and distribute narcotics. (App. 1-10). The circuit courts have recognized various defenses which, if claimed by the defendant, will clearly place the defendant's intent in issue, thus satisfying Huddleston's requirement that the implicated 404(b) element be both material and at issue. See, e.g., United States v. Hearst, 563

F.2d 1331 (9th Cir. 1977) (duress); United States v. Henciar, 568 F.2d 489 (6th Cir. 1977) (entrapment); United States v. Smith, 552 F.2d 257 (8th Cir. 1977) (intoxication). Likewise, if the defendant provides an innocent explanation for his act, prior crimes evidence will be admissible to show his intent to commit a criminal act. See, e.g., United States v. Dworken, 855 F.2d 12, 27 (1st Cir. 1988).

In fact, petitioner rested his case without presenting any evidence. Unless and until petitioner disputed the issue of intent, it was not a material factor in issue. See United States v. Rivera. A defendant's claim that he did not perform the criminal acts at all does not place intent in dispute. United States v. Colon, 880 F.2d 650 (2nd Cir, 1989). However, from the decision in this case, it is clear that the Fourth Circuit rule

is otherwise, that the denial of the acts themselves puts motive and intent at issue for the purposes of Rule 404(b).

The testimony of Caviness, Baker, Lyles, and the Smiths were unrelevant to the actual crimes charged. The mere fact that James possessed and distributed narcotics in the past is not indicative of his intent to do so at a later time. The Fourth Circuit's mere recitation that this evidence is indicative of intent masks the fact that this evidence was, in reality, evidence of petitioner's propensity to commit similar crimes - the exact inference forbidden by Rule 404(b).

Even if intent were a material factor in dispute in petitioner's case, the evidence proffered was not relevant to his intent as to these charges, and its prejudicial effect outweighed its probative value. Possession of cocaine at

one point in time does not create an inference of possession nineteen months earlier, without relying on an impermissible assessment of the defendant's character. United States v. Garcia-Rosa, 876 F.2d 209 (1st Cir. 1989); Remarkably, in the instant case, the government rejected James's offer to stipulate that he'd been a drug dealer for two decades, specifically so that it could try his entire history of drug dealing in graphic and irrelevant detail. (App. 128).

The Fourth Circuit held that the evidence of the prior conspiracy was also properly introduced to show petitioner's motives in undertaking certain actions and dealing with certain persons. (App. 1-10). Again, James' motive was not a material factor in this case, nor was it a factor placed in dispute by him as

required by Huddleston. The Fourth Circuit's decision, which endorses the admission of such evidence merely upon a denial of the acts charged, is thus in conflict with the decisions of other circuits.

In most situations, prior crimes are introduced as evidence of motive in order to show a defendant's reasons for committing the charged crimes. Jack B. Weinstein and Margaret A. Berger, Weinstein's Evidence Manual, ¶7.01[9] (1992). For example, prior crimes have been admitted to show that the defendant committed the crime because he needed money (United States v. Shriver, 842 F.2d 968 (7th Cir. 1988)), or drugs (United States v. Troop, 890 F.2d 1393 (7th Cir. 1989)), or because he sought to conceal a previous crime (United States v. Kerr, 778 F.2d 690 (11th Cir. 1985)), escape after

committing a previous crime (Hernandez v. Cepeda, 860 F.2d 260 (7th Cir. 1988)), or to silence a potential witness (United States v. Willoughby, 860 F.2d 15 (2nd Cir. 1988)).

None of these factual situations are present in this case. Clearly, the inclusion of motive in Rule 404(b) was not intended to be of such broad scope as to permit a showing of a defendant's motive for dealing with certain persons, or for taking certain actions that do not establish the commission of the crime. In fact, introduction of prior crimes under the guise of proving motive in these situations is actually introducing those crimes to show defendant's character to commit crimes - the exact prohibition of Rule 404(b). The Fourth Circuit's decision in this case effectively abolishes Rule 404(b) as a limitation upon

the admission of other crimes evidence.[2]

In the instant case, there can be no

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[2]. The Fourth Circuit stated, without analysis, that "[d]etails of the [D.C.] operations also revealed similarities between the charged conduct and the previous operations - evidence of a common plan or scheme." (App. 1-10).

In order to be admissible for the purpose of showing a common plan or scheme, the evidence must be close in time to the charges for which petitioner is being tried. United States v. Smith, 727 F.2d 214, 219-21 (2nd Cir. 1984); United States v. Lemaire, 712 F.2d 944 (5th Cir. 1983). Stale transactions are not admissible to show a common plan or scheme see, Garcia-Rosa.

Moreover, the testimony of the prior transactions was obviously different in character than the unique circumstances involved in the alleged plot which formed the basis of the charges for which petitioner was being tried. Evidence of prior bad acts used to show a common scheme or plan must be "so nearly identical in method as to earmark them as the handiwork of the accused. [M]uch more is demanded than the mere repeated commission of crimes of the same class.... The device used must be so unusual and distinctive as to be like a signature." United States v. Bennedetto, 571 F.2d 1246, 1249 (2nd Cir. 1979).

debate as to the government's purpose in proffering the 404(b) evidence, since, in rejecting petitioner's offer to stipulate that he had been a drug dealer for two decades, the prosecutor candidly admitted that he intended to try petitioner for his history of drug dealing. Incredibly the courts below condoned the use of this evidence without even bothering to conduct the required prejudice analysis under Federal Rule of Evidence 403, in the face of an admittedly improper government purpose.[3]

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[3]. Also, contrary to the approach of other circuits, the Fourth Circuit condoned, in this case, the admission of 404(b) evidence, for the purposes of proving motive or intent, in the government's case-in-chief.

The Second Circuit has held that evidence of prior crimes cannot be used in the government's case-in-chief to prove intent merely because the defendant entered a plea of not guilty. United States v. Reed, 639 F.2d 896 (2nd Cir. 1981). Rather, such evidence will be allowed only in rebuttal if the defendant placed intent in issue during the

III. PETITIONER RICHARD L. SMITH WAS ENTITLED TO A JURY INSTRUCTION AS TO THE VOLUNTARINESS OF HIS CONFESSION.

The district court refused to instruct the jury to consider the voluntariness of his statement to law enforcement officers. Prior to trial, Richard had moved to suppress the statement as involuntary, which motion the

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presentation of his case, if any, or during opening statements. Id. This rule allows the trial judge to determine whether the 404(b) factor sought to be proved by the evidence is indeed in dispute, and whether its probative value is substantially outweighed by its prejudicial effect. United States v. Figueroa, 618 F.2d 934 (2nd Cir. 1980).

Other circuits allow the introduction in the case-in-chief of prior crimes to prove intent when, unlike here, specific intent is an element of the crime charged. See, e.g., United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982) (intent to defraud); United States v. Weidman, 572 F.2d 1199 (7th Cir. 1978) (mail fraud); United States v. Adcock, 558 F.2d 397 (8th Cir. 1977) (extortion).

court denied after an evidentiary hearing. During the trial, Richard introduced the note from the police which was used to induce him to come to speak with the investigators which resulted in the statement that was subsequently used against him. That note, which was left with Richard's wife, stated as follows: "It is very important that Richard Leander Smith contact me as soon as possible. He will be able to save himself some serious problems by talking with us...." (App. 129).

In affirming the trial court's refusal to instruct the jury under 18 U.S.C. §3501, the Fourth Circuit held that that section does not require that the jury be so instructed unless "the defendant has contested at trial, the voluntariness of the confession." (App. 1-10). The court did not explain what a

defendant must do in order to "contest" the issue of voluntariness. The Court of Appeals also noted that its previous decision in United States v. Inman, 352 F.2d 954 (4th Cir. 1965), which required the jury to find that a confession was voluntary before giving it any weight, was of questionable vitality in light of this Court's decision in Lego v. Twomey, 404 U.S. 477 (1972) and the enactment of 18 U.S.C. §3501, in 1968.

This court has not previously considered what action, if any, a defendant need take in order to become entitled to the jury instruction contemplated by 18 U.S.C. §3501. The statute itself contains no such requirement, but merely provides that, if the trial judge initially determines that the statement is admissible, the court "shall instruct the jury to give such

weight to the confession as the jury feels it deserves under all the circumstances." (Emphasis added).

The statute was enacted in response to this Court's opinion in Mallory v. United States, 454 U.S. 449 (1957), to broaden the scope of the inquiry as to voluntariness by removing delay alone as cause for suppression of a statement. United States v. Halbert, 436 F.2d 1226 (9th Cir. 1970). The statute specifically does not require either the defendant or the government to rely on each of the factors identified in the statute; rather, the statute clearly contemplates that the finder of fact may rely on any, or all, of the factors, as appropriate. Nothing in this Court's decision in Lego v. Twomey changes that fact, or requires any particular action by the defendant to put the issue of voluntariness before the

jury.

In this case, Richard introduced the note delivered by the police officer to him, indicating that, by meeting with them, he would "be able to save himself some serious problems...." (App. 129). That note was sufficient to raise an inference as to the voluntariness of the subsequent statement and to place the voluntariness of the statement at issue. Therefore, Richard had an absolute statutory right to have the jury instructed as to that issue. The Fourth Circuit clearly erred in holding that anything more than that was required.

CONCLUSION

For the foregoing reasons, the petitioners, James E. Smith and Richard L. Smith, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Fourth Circuit, entered in the above-entitled proceedings on June 10, 1992.

Respectfully submitted,

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